

HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

R.S.A.No.2766 of 2005.

Date of decision : 13.11.2006.

Dev Sarup Mathur and others

.....Appellants

versus

Kuldip Kumar Rajpal and others

.....Respondents

CORAM : HON'BLE MR. JUSTICE HEMANT GUPTA.

Present: Shri S.K.S.Bedi, Advocate for the appellants.

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JUDGMENT

HEMANT GUPTA, J (Oral)

The plaintiffs are in second appeal aggrieved against the judgment and decree passed by the Courts below, whereby their suit for declaration claiming the estate of Champa Devi being her nearest heirs being collateral of her husband, was dismissed.

Chamba Devi died on 4.2.1972. It is the stand of the defendants that she has executed a Will dated 8.4.1971 in favour of her brother Bihari Lal and he claimed the estate of Chamba Devi as her legatee. Both the Courts below have found that in view of the Will dated 8.4.1971, Exhibit DW-3/A, having been proved on the basis of statement of DW-3, Basheshwar Nath, the plaintiffs are not entitled to the estate of deceased Champa Devi.

In the second appeal, learned counsel for the appellants raised an argument that no issue regarding Will was framed by the learned trial Court and, therefore, the plaintiffs-appellants were misled in leading the evidence.

However, I do not find any merit in such an argument raised by learned counsel for the appellants. The defendants have relied upon the Will dated 8.4.1971 in the written statement itself. Though no issue was framed, but parties understood the case that question of inheritance of Champa Devi is in dispute which is based on Will dated 8.4.1971. Having led the evidence before the trial Court, the plaintiffs cannot be permitted to raise an argument that proper issues were not framed.

Another argument raised by learned counsel for the appellants is that the judgment dated 22.2.1995, Exhibit P-7, has not been taken into consideration, wherein it was found that Champa Devi has not executed the Will dated 8.4.1971. The said judgment was arising out of a suit for injunction, filed in the year 1990 i.e. during the pendency of the present suit. No argument, based on such judgment, has been raised by the learned counsel for the appellants before the Courts below. For the first time, an argument has been raised in the second appeal. Since the question whether the judgment is relevant to the present case or not, is the mixed question of law and facts, therefore, I do not find that the plaintiffs are justify in relying on said judgment in second appeal for first time.

Another argument raised by learned counsel for the appellants is that DW-3 Basheshwar Nath, attesting witness has admitted in his cross-examination that at the time of attestation of the Will, he, Jai Ram scribe and executant Champa Devi alone were present in the room. It is argued that for proof of Will, it is required that both the attesting witnesses signed in the presence of testator and the testator signs the will in presence of the attesting witnesses. The said argument is again not tenable. The Will is for the year 1971, whereas, Basheshwar Nath was examined as witness in

March, 1998 i.e almost after 27 years. Lapse of time in examining the witnesses can lead to certain discrepancies, but such deficiencies are not sufficient to vitiate the findings that Champa Devi has executed Will.

No other argument was raised.

I do not find any illegality or irregularity in the findings recorded by the Courts below, which may raise any substantial question of law in the second appeal.

Dismissed in limine.

November 13, 2006

**mohinder*

**(HEMANT GUPTA)
JUDGE**